TAN LEE SIANG & ORS

v.

KENNEISON BROTHERS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[CIVIL APPEAL NO: R1-12-195 OF 1998]
3 FEBRUARY 1999

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Application to set aside dismissal of action due to absence of plaintiff at hearing - Plaintiff's action dismissed under O. 28 r. 7(a) of Subordinate Courts Rules 1980 - Whether plaintiff has locus standi to apply under O. 28 r. 8 to set aside dismissal - Whether Sessions Court has jurisdiction to hear application - Whether plaintiff should have appealed to High Court*

This was the plaintiffs' appeal against the decision of the Sessions Court dismissing their application to set aside an earlier decision of the Sessions Court dismissing the plaintiffs' consolidated actions. The sessions judge held that the plaintiffs had no *locus standi* to make the application as they should have appealed the earlier decision to the High Court. The earlier decision dismissing the plaintiffs' consolidated actions under O. 28 r. 7(a) of the Subordinate Courts Rules 1980 ('the SCR') was made on the basis of the plaintiffs' absence at the hearing. Counsels for both the plaintiffs and the defendants were however present.

Held:

[1] When the rules mention "party" being absent they must mean either the party or his counsel being absent. If the court gave judgment for the plaintiff and dismissed the defendant's counterclaim because the defendant or his counsel was absent, or if the court dismissed the action and gave judgment on the counterclaim if the plaintiff or his counsel was absent, the court would have had no hearing of the case on its merits. Judgment or dismissal was made because either a party or his counsel was absent and not because there was a hearing on the merits. Therefore, there should be allowed an application to the court by the party or whose counsel was absent to set aside any judgment or order made under O. 28 r. 7 of the SCR. Consequently, the plaintiffs had the *locus standi* under O. 28 r. 8 of the SCR to apply to set aside the judgment or order of dismissal.

[Appeal allowed, sessions judge to hear plaintiffs' application.]

Case(s) referred to:
Gan Kim Kiat & Brothers Realty Sdn Bhd v. Leang Ah Kan [1983] 1 CLJ 298 ***(refd)***
Rachman v. Tabrum (1923) 39 LTR 380 ***(refd)***
Shaharuddin Abdul Rahman v. Satisah Ismail Sdn Bhd [1982] 2 MLJ 79 ***(refd)***

Legislation referred to:
Subordinate Courts Rules 1980, O. 28 rr. 5, 6, 7, 8

For the appellants - KS Ong; M/s KS Ong & Co
For the respondent - Shelina Razaly; M/s Kumar Jaspal Quah & Aishah

Reported by Farah Naim

JUDGMENT

KC Vohrah J:

Five Sessions Court civil actions involving the same defendant and ten different plaintiffs were consolidated. On 20 January 1998 the consolidated actions came up for hearing. Counsel for all the plaintiffs was present as was counsel for the defendant. I do not have the notes of proceedings of the case but it appears from the orders made under the separate civil actions that the cases were dismissed ("dibuang") as the plaintiffs and their witnesses were absent. An application was filed by seven plaintiffs to set aside these orders before the orders were perfected but the Sessions Judge dismissed the application on the basis of a preliminary objection advanced by counsel for the defendant that the plaintiffs did not have *locus standi* since the plaintiffs should have appealed the decision to the High Court.

It would appear that the Sessions Judge dismissed the consolidated actions under O. 28 r. 7(a) or the Subordinate Court Rules 1980.

O. 28 SCR relates to proceedings heard in open court.

O. 28 provides, *inter alia*, for situations when an action is called on for hearing:

(a) where neither party appears;

(b) where the defendant does not appear; and

(c) where the plaintiff does not appear.

As for the situation where neither party appears r. 5 is applicable – the action may be **struck out**. But the rule itself provides for the restoration of the action.

It reads:

> 5(1) If, when an action is called on for hearing, neither party appears, the action may be struck out, without prejudice, however, to the restoration thereof, on the direction of the Judge.
>
> (2) An application under this rule must be made within 14 days after the hearing.
>
> (3) Where an action is restored, notice of restoration in Form 73 must be given by the Registrar to the parties to the action.

The neutral words "struck out" are used in r. 5 since they cover the situation when both parties do not appear as no judgment or dismissal on a plaintiff's claim or a defendant's counterclaim arises to be decided.

As for the situation where the defendant does not appear, r. 6 provides for **judgment** for the plaintiff's claim and **dismissal** of the defendant's counterclaim if there is one. Rule 6 does not itself provide for the procedure for the judgment or the order of dismissal of the counterclaim to be set aside.

Rule 6 reads:

> 6(1) If, when an action, other than actions to which Orders 43, and 45 apply, is called on for hearing, the plaintiff appears but the defendant does not appear, the Court may:
>
> (a) if the defendant has no counterclaim, on proof of service give judgment for the plaintiff on his claim; and
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> (b) if the defendant has a counterclaim, dismiss the counterclaim with costs; and make any other order as it thinks just.

Rule 7 provides for the situation where the plaintiff does not appear when the action is called. It allows for the court to dismiss the action if the defendant has no counterclaim and if he has, to give judgment for the defendant. Rule 7 itself does not provide for the procedure for the judgment on the counterclaim or order of dismissal of the plaintiff's action to be set aside.

Rule 7 reads:

> 7. If, when an action is called on for hearing the defendant appears but the plaintiff does not appear the Court may:
>
> (a) if the defendant has no counterclaim, dismiss the action with costs;
>
> (b) if the defendant has a counterclaim, give judgment for the defendant on his counterclaim; and
>
> made any other order as it thinks fit.

As stated earlier neither r. 6 itself nor r. 7 itself provides for the procedure for setting aside the judgment or order obtained under the rule. As a drafting device r. 8 takes care of the procedure where the judgment or order given in the absence of a party (whether plaintiff or defendant) may be set aside. It reads as follows:

> 8(1) Any judgment or order obtained where one party does not appear at the hearing may be set aside by the Court, on the application of that party, on such terms as it thinks just.
>
> (2) An application under this rule shall be subject to Order 29, rule 14.

It will be noted that neither rr. 6, 7 or 8 envisages a situation where the judgment or order was given after a trial; no evidence was adduced and the judgment or order was given because of the absence of the plaintiff or defendant when the action was called for hearing. Both rr. 6 and 7 are obviously to cope with the situation where the trial cannot go on as one of the parties is absent. A plaintiff's counsel cannot effectively proceed with the trial if the plaintiff whose evidence is essential for the case is absent. Likewise the defendant's counsel cannot effectively proceed with the trial if the defendant is absent and his evidence is essential.

I must place on record that I am aware of the case *Shaharuddin bin Abdul Rahman v. Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79 but it is not exactly on point. Of interest is however the case of *Gan Kim Kiat & Brothers Realty Sdn Bhd v. Leang Ah Kan* [1983] 1 CLJ 298 at 299 where Peh Swee Chin J (as he then was) had this to say:

> The second point I wish to stress is that in a civil case, unlike a criminal case, a litigant can always be represented by his solicitors who is a duly authorised agent for a plaintiff or a defendant. Such being the case, that when a civil case, it follows, comes up for hearing as fixed the solicitors can be present without his client. If the solicitor is present, and his client is absent, then no court can give judgment (e.g. for a liquidated demand) in default of appearance, when the solicitor's client is defendant or dismiss the claim with costs when the solicitor's client is plaintiff. If the court orders the case to proceed when a solicitor is present but without his client, then it merely means in practical terms, that the said solicitor is deprived of a possibly most important material witness ...

It seems to me that when the rules mention "party" being absent they must mean for practical purposes as the context requires either the party or counsel being absent. The trial judge may or may not proceed with the trial when a party or his counsel is absent depending on whether evidence can be adduced that day in respect of the party concerned and for other relevant reasons. If he gives judgment for the plaintiff and dismisses the counterclaim of the

defendant because the defendant or his counsel is absent or if he dismisses the action and gives judgment on a counterclaim if the plaintiff or his counsel is absent the judge would have had no hearing of the case on its merits. Judgment or dismissal is made because either a party or his counsel is absent and not because there is a hearing on the merits and there should be allowed an application to the court by the party or whose counsel was absent to set aside any judgment or order made under O. 28 r. 7 of the SCR. The party has *locus standi* under O. 28 r. 8 to apply to set aside the judgment or order of dismissal.

As was remarked by Lord Chief Justice Hewart in *Rachman v. Tabrum* [1923] LTR XXXIX 380 at 381:

> The principle is where a summon to case has not been heard, but merely struck out, the Court may if it thinks fit, hear or entertain the summon or case, but if there has been a hearing on the merits, though in the absence of one party, it cannot do so after the order is perfected.

I therefore allow the appeal. The Sessions Judge is to hear the application filed by the appellants in his court to set aside the order of dismissal of the plaintiffs' actions.